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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 264

D. SPENCER GROW, PETITIONER

v.

UNITED STATES OF AMERICA

No. 275

C. ORAN MENSIK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-64a) is reported at 394 F. 2d 182.

JURISDICTION

The judgment of the court of appeals was entered on March 18, 1968. A petition for rehearing was denied on June 3, 1968. The petition for a writ of cer-

tiorari in No. 264 was filed on July 3, 1968, and in No. 275 on July 8, 1968.[1]

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence supports the conviction of petitioners for mail fraud (raised by both petitioners).

2. Whether the trial court properly denied a request to take depositions of members of the jury in order to determine the reasons for their verdict (raised in No. 264).

3. Whether petitioner Mensik was denied his right to counsel and his right to be personally present during the voir dire examination of prospective jurors (raised in No. 275).

4. Whether petitioner Mensik should have been granted a severance (raised in No. 275).

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Virginia, petitioners were convicted of using the mails to defraud, in violation of 18 U.S.C. 1341. Petitioner Grow was convicted on counts 3 and 8, and was sentenced to concurrent terms of four years' imprisonment and a fine of $1,000 on count 3. Petitioner Mensik was convicted on counts 6, 7 and 8; he was sentenced to concurrent terms of five years' imprisonment and a fine of $3,000 ($1,000 on each count) (Gr. App. 1–13; Men. App.

[1] The petition in No. 275 is out of time under Rule 22–2 of the Rules of the Court.

34–35).[2] The court of appeals reversed the conviction of Grow on count 3, and affirmed the judgments of conviction in all other respects.

The indictment alleged that Grow, who controlled several Utah and Idaho savings and loan associations, and Mensik, who controlled several Illinois associations, organized several Maryland associations[3] and an insurance company known as Security Financial Insurance Corporation (SFIC). SFIC, it was alleged, was organized for the purpose of enabling petitioners to represent to depositors that the accounts in associations which they controlled were "insured." It was further alleged that petitioners represented to depositors in the associations (by brochures, specimen insurance policies, financial statements, and advertising leaflets, distributed through the mails) that investments in the associations were safe and desirable because of strict supervision by SFIC, which required monthly reports and made periodic examinations and

[2] We are lodging appendices filed in the court of appeals by Grow, Mensik and the government, referred to herein as "Gr. App.", "Men. App." and "Govt. App.". The nine-count indictment, returned in the District of Maryland, was against petitioners and co-defendants Culver, Boone, Ellicott and McGurren, Culver pleaded *nolo contendere*. Boone and Ellicott were granted a severance and tried separately. Upon petitioners' motion, this cause was transferred by agreement to the Eastern District of Virginia. At the completion of the government's evidence, the court sustained McGurren's motion for judgment of acquittal and a similar motion by petitioners as to count 2 and a portion of count 1 (App. to Grow Pet. 2a-3a, 53a).

[3] It was alleged that Grow controlled First Fidelity and First Guarantee and Mensik controlled Commercial, Maryland Thrift, First Financial, Maryland Financial, First General and Maryland District Savings and Loan Associations.

audits; and that these representations were false and fraudulent because the officers and directors of SFIC were continually informed that the management of the associations employed unsound financial practices which jeopardized the security of funds invested therein. Count 6 charged that, for the purpose of executing such scheme to defraud, defendants caused the mailing of a letter containing a question and answer brochure about SFIC to a Mr. Harold Brightbill. Count 7 charged the mailing of a letter containing the brochure, a financial statement of SFIC, and an advertising leaflet of SFIC to a Mr. Gerald Jansek. Count 8 charged the mailing of a letter containing the brochure, a financial statement of SFIC, and a specimen copy of a Shareholder's Guarantee Policy of SFIC to a Mr. Thomas O'Connell (Gr. App. 1–12).

The evidence is summarized in detail in the opinion below. In brief, it showed that in 1957 Mensik organized a Maryland savings and loan association, known as *Commercial Savings and Loan,* which Mensik thereafter dominated (Men. App. 96–101, 166–167, 169–175; Govt. App. 127–133, 163). In 1958, Grow was president of the *Utah Savings and Loan Association,* which was encountering difficulties with the Utah Insurance Commissioner because its claim of insurance for deposits was based upon purported insurance from a Moroccan company (Men. App. 102, 105–107; Govt. App. 43–47, 64–65). In the latter part of 1958, Mensik sent one Suchman and codefendant McGurren (who had been attorney for the Moroccan company), to Salt Lake City to meet with Grow and

organize a second Moroccan insurance company to succeed to the first, the funds to be kept in a Canadian bank. *Commercial*(M) and *Utah Savings and Loan*(G) thereafter acquired insurance from the second company (Men. App. 107–112).

Thereafter, Mensik and Grow employed one Applegarth to procure old savings and loan charters in Maryland and to convert them into new associations. Applegarth was told there would be no difficulty in obtaining insurance (Govt. App. 66–72). Applegarth acquired three charters, paying for them with funds furnished under the direction of petitioners. Two new companies were formed—*First Fidelity,* acquired by Grow, and *Maryland Thrift,* whose stock was held in the name of an investment company whose nominal head was Mensik's brother-in-law (Govt. App. 74–81, 127–133, 163). On the day *First Fidelity* came into existence, it was insured by the second Moroccan company (Govt. App. 81).

Grow, however, continued to encounter difficulties with the Utah Insurance Commissioner with respect to insurance obtained from the second Moroccan company (Govt. App. 45–49). In the spring of 1959, McGurren directed a Canadian lawyer to form two Canadian companies (*Lock Securities, Ltd.,* and *Channel Investment, Ltd.*) to hold stock in a Maryland insurance company, which was to insure accounts in privately owned savings and loan associations. The stock of the Canadian companies was to be held by two Moroccan companies (Govt. App. 360–364). In July 1959, McGurren accompanied by Mensik's broth-

er-in-law, visited the Canadian lawyer he had earlier retained to arrange for the financing of SFIC (Govt. App. 365–368, 381). Assets amounting to $390,000 were converted into cash and placed in accounts for the two Canadian companies, *Lock* and *Channel,* and used as the major part of the capital of SFIC (Govt. App 368–374).[4]

In the spring of 1959, Mensik met with co-defendant Boone, a member of the Maryland legislature, and discussed the formation of a Maryland insurance company (Men. App. 113–117). In mid-July, Boone met co-defendant Culver at the race track and told him casually that a Maryland insurance company was being formed. Culver told Boone not to forget him in the organization of the company, and a month later Culver was told that he had been named president of the newly-formed SFIC (Govt. App. 280–281).

On September 14, 1959, SFIC was licensed to do business by the Maryland Insurance Department. On the same day, SFIC issued binders on savings ac-

[4] In early 1959, pursuant to instructions of Mensik, Suchman, as president of *Commercial*, bought mortgage insurance from the second Moroccan company and paid in excess of $100,000 therefor (Men. App. 174–175, 189–190). On July 24, 1959, pursuant to instructions of Grow, Applegarth, as president of *First Fidelity*, bought $30,000 worth of mortgage insurance from the second Moroccan company through McGurren and the Canadian lawyer. He also bought a mortgage in the amount of $42,000 from a Utah savings and loan association of which Grow was president (Govt. App. 84–85). In May 1961, after repeated requests by Applegarth, *First Fidelity* received a policy for the insurance bought in July 1959, which was delivered by Grow (Govt. App. 106–112). The policy was incomplete and efforts by the accountant auditing the books to obtain an endorsement which would grant coverage were unsuccessful (Govt. App. 270–271).

counts to *Utah Savings and Loan* (G) and *First Fidelity* (G), which Grow personally picked up (Govt. App. 98–99). These binders were issued without any audits or examination of the associations by SFIC and before SFIC had received applications or any payments from the insured associations (Govt. App. 126–127, 179–182, 187–194, 220–235).

A binder was not issued to *Commercial* (M) until December 1959. Mensik explained to Suchman (the president of *Commercial*) that they did not want to get this insurance right away because people would accuse them of being connected with the insurance company (Men. App. 122–123).

In October 1959, SFIC retained the services of Mr. Bernard Aiken, a certified public accountant, who thereafter submitted written reports and discussed his examinations on a number of occasions with Mensik (Govt. App. 260–265, 270–271, 315–317). Aiken's report on *Maryland Thrift* (M) showed substantial net losses from its operations and the illegal payment of dividends (Govt. Exhs. 158–161). *Maryland District* (M) (as to which Aiken had a number of discussions with Mensik) had operated at a loss for a year prior to its application for insurance, which was nevertheless granted by SFIC (Govt. App. 164–167). *Broadway Savings and Loan,* which became *First Guarantee Savings and Loan,* purchased by Applegarth for Grow, operated at a deficit for nine months ending March 31, 1961 (Govt. App. 1125–1126, 2029–2033, Govt. Exh. 169). The issuing of insurance to *Progressive Annapolis Savings and Loan*

was resisted by Culver, as president of SFIC, but was later issued to a successor company through the intervention of Mensik, who said that he had invested a lot of money and needed the insurance (Govt. App. 317–330).

SFIC conducted an extensive advertising campaign, in which it was assisted by the various associations insured by it. These advertising methods received the personal endorsement of both Grow (Govt. App. 250–251) and Mensik (Men. App. 142–144) and were widely distributed by the associations which they controlled (Govt. App. 131, 139, 213–214, 222; Men. App. 140–144).

ARGUMENT

1. The record amply supports the jury's verdicts that both petitioners participated in a scheme to defraud investors in their various savings and loan associations and caused the mails to be used in execution of that scheme. SFIC was organized by petitioners to provide depositors' insurance after the two Moroccan companies failed to meet the standards of the Utah Insurance Department. The representations thereafter made that SFIC was dedicated to guarantee the safety of depositors and that it followed sound and progressive policies were not in accord with the facts. Immediately after SFIC was licensed by the State of Maryland, it issued binders to the Grow and Mensik associations, without any

application, payment of premiums, or audit of the insured associations. When later audits reported irregularities, they were uniformly disregarded and the insurance continued (*supra,* pp. 7–8).

Grow contends that the evidence failed to show that he had knowledge that the representations by SFIC were false or misleading. His knowledge was shown by the fact that SFIC immediately issued binders to his associations without requiring any of the normal preconditions, and that the insurance thus obtained was continued despite losses and deficits of those associations. Grow argues that the irregularities of *Utah Savings and Loan* appear solely from Exhibits 155, 156 and 178, which were admitted only to prove that this information was brought to the attention of SFIC and not to prove the truth of their contents (Govt. App. 307–308). However, Culver testified that on numerous occasions he discussed with Grow the difficulties both of the Utah association and of *First Fidelity,* which had received more than a half million dollars in commercial paper from the Utah association, and that Grow said he was going to try to work it out when he got back to Utah (Govt. App. 340–341, 345–346). On December 12, 1959, prompted by inquiries from the Associated Press and a promised visit from an examiner of the Maryland Insurance Department, Grow met with Ellicott, Culver and others at the offices of SFIC and set up an entire backdated file for Grow's *Idaho Savings and Loan Association* (Govt. App. 288–290). Grow's knowledge of

the distribution of misleading advertising material was shown by his requests for SFIC financial statements, copies of the question and answer brochure, and his visits to *First Guarantee* in Maryland, where he checked the files to ensure that the printed matter of SFIC was being sent out in answer to inquiries by present and prospective depositors (Govt. App. 9–10, 214–217, 250–251).

Mensik urges that his full time was taken with his Illinois building and loan business and that the evidence failed to show that he was a stockholder or officer in any of the companies involved or that he sent out any of the letters set forth in counts 6, 7 and 8. While Mensik acted through others, there is ample evidence of his control of several Maryland savings and loan associations (see *supra,* pp. 4–5, and the carefully detailed account in the court of appeals opinion). It was not necessary to show that Mensik actively took part in mailing the various letters. Where one devises a scheme knowing that the use of the mails will follow in the ordinary course of business, or where such use can reasonably be foreseen, he causes the mails to be used. *Pereira* v. *United States,* 347 U.S. 1, 8–9. The mailing of the letters was a step in the execution of the fraudulent scheme. *Badders* v. *United States,* 240 U.S. 391, 394; *Parr* v. *United States,* 363 U.S. 370, 390.

2. The court correctly instructed that it was not necessary to find that a particular defendant mailed a particular letter or directed it to be mailed, if the jury found that a defendant devised or knowingly

participated in the scheme (Gr. App. 102–103, 107, 109, 110–112, 121). *United States* v. *Sapperstein;* 312 F. 2d 694, 698–699 (C.A. 4). Grow does not question the accuracy of these instructions, but argues that he was erroneously convicted on count 8 [5] because the jury's theory of guilt, he assumes, was that a defendant was not liable for the mailing of a letter by an association not under his personal control, and there was no evidence that he was connected with any of the associations mentioned in the letter in count 8. As the court of appeals pointed out, such an assumption is wholly speculative. Grow, in effect, claims the right to interrogate the jurors by deposition to determine whether that theory of guilt was applied by the jury. It is well established, however, that jurymen cannot be collaterally interrogated to determine the reasons for their verdict. See *Hyde* v. *United States,* 225 U.S. 347, 383–384; *McDonald* v. *Pless,* 238 U.S. 264, 267; *United States* v. *Crosby,* 294 F. 2d 928 (C.A. 2), certiorari denied *sub nom. Mittelman* v. *United States,* 368 U.S. 984; 8 WIGMORE, *Evidence* (Third Ed.) § 2349. Furthermore, even if Grow's acquittal on other counts was based upon the theory of responsibility which petitioner assumes the jury imposed, it was no more than an act of lenity which need not be extended to the count on which a finding of guilt is amply sustained by the evidence. See *Dunn* v. *United States,* 284 U.S. 390, 393–394.

3. Petitioner Mensik contends that he was obliged to go to trial without counsel and that he was denied

[5] Counts 6 and 7, on which Mensik alone was convicted related to inquiries to SFIC about *Commercial Savings and Loan,* a Mensik Company.

the right to be present during the voir dire of the jury panel.

On Monday, October 28, 1963, the date set for trial in Richmond, Virginia, Mensik appeared and told Judge Roszel C. Thomsen, that he had reached an impasse with his attorney, Mr. Edward J. Calihan, of Chicago, on the previous Friday, and that Mr. Calihan was no longer his attorney. Mensik also renewed his motions for severance and for the disqualification of Judge Thomsen (Men. App. 73–74). He stated that he was prepared to act as his own counsel, and the court replied that he would be allowed to do so upon filing an appropriate paper electing to represent himself rather than to employ Richmond counsel. When Mensik replied that he had not agreed to act as his own counsel, the court told him that until he had made his decision whether to act in his own behalf, retain other counsel, or retain other counsel to work with his present counsel, Mr. Calihan would have to remain in the case. Mr. Calihan's motion to withdraw was denied (Men. App. 76, 78).[6]

[6] Mr. Calihan, who had previously represented Mensik in the *Commercial* fraud case in Baltimore and before the tax court, had entered his appearance in this case on March 1, 1963. He had made a number of motions, including a successful motion to disqualify Judge R. Dorsey Watkins, after which Judge Thomsen was designated (Govt. App. 30–31). Shortly thereafter, in the presence of Mensik, Judge Thomsen told McGuren, whose attorney, Mr. Maurice J. Walsh, had attempted to withdraw, that he would not permit such a withdrawal at the last moment as an excuse for postponing the trial (Govt. App. 32–33, 417–418, 461). The case had thereafter been transferred by agreement to Richmond, all parties agreeing that Judge Thomsen should preside (Govt. App. 424–430).

Mensik did not reveal to the trial court the reason for his impasse with counsel. The reason, as stated in his affidavit of May 10, 1968 (filed with his petition here), was that Judge Thomsen had made a slighting remark about foreigners and counsel had refused to assist him in seeking Judge Thomsen's disqualification (Men. Pet. App. 21–26).[7] In overruling Mensik's *pro se* motion to disqualify the judge, Judge Thomsen, explained that he did not know that Mensik was of foreign birth and did not direct the comment at him or any of the other defendants, but was speaking only of the situation faced by governmental officials and the grand jury at the times under consideration (Men. App. 33–34).

Shortly after Mensik's announcement that he had reached an impasse with counsel, Mr. Calihan told the court that Mensik had authorized him to remain and conduct the voir dire and that, inasmuch as Mensik had already been introduced to the panel, he had gone out looking for a lawyer (Men. App. 78). The extensive absences during voir dire, alleged by Mensik, are not evident from the record. It appears Mensik returned to the courtroom later in the day on

[7] The statement, made while the court was ruling on pre-trial motions on October 2, 1963, was as follows (Men. App. 30–31):

> The Court cannot close its eyes to the fact that Maryland, being the only state or all but one in which there was no regulation of savings and loan associations, that during the last couple of years any number of foreign—not foreign—let us say, people from other states came into Maryland and organized Maryland savings and loan associations in numbers completely out of line with anything that had ever happened before.

Monday, October 28, and that on the following day he asked to be excused and was permitted to leave the courtroom (Govt. App. 438, 443).

When the trial was ready to proceed on the afternoon of the following Monday, November 4, Mensik stated that if the court were going to order him to trial without counsel, he would do so, but that he did not feel that Mr. Calihan should be present in the courtroom. He stated that he believed that his new counsel would be present on the following day, but that he did not know (Men. App. 84–85). Thereafter, Mr. Mensik made his own opening statement (Men. App. 85–88). Mr. Kinsey James arrived on the third trial day but the court refused to excuse Mr. Calihan until Mr. James stated that he was prepared to go forward without further delay (Men. App. 191–194). Mr. Calihan was permitted to withdraw after Mr. James entered his appearance on November 6 (Men. App. 198; Govt. App. 456–457).

The court's refusal to permit delay of the trial by reason of an alleged dispute with counsel was not an abuse of discretion. Counsel's refusal to seek the disqualification of Judge Thomsen had been followed by the court's denial of Mensik's *pro se* motion on October 16. Mensik thus had time to seek other counsel before the trial date of October 28. A defendant may not, through a deliberate process of discharging counsel on the eve of trial, subvert sound judicial administration. *United States ex rel. Davis* v. *McMann,* 386 F. 2d 611, 618 (C.A. 2), certiorari denied, 390 U.S. 958; *United States* v. *Clausell,* 389 F. 2d 34 (C.A. 2);

United States v. *Bentvena,* 319 F. 2d 916 (C.A. 2), certiorari denied *sub nom. Ormento* v. *United States,* 375 U.S. 940.

Contrary to petitioner's contention, he was not denied his right to be present during the questioning of the jury panel. His absence on October 28 was entirely upon his own initiative, with instructions to Mr. Calihan to proceed without him. His absence on the next day followed a request to the court that he be excused (supra, p. 14). While he had a right to be present, he was entitled to waive that right. Rule 43, F.R. Crim. P.; *Diaz* v. *United States;* 223 U.S. 442, 453; *Pearson* v. *United States,* 325 F. 2d 625 (C.A. D.C.); *Parker* v. *United States,* 184 F. 2d 488 (C.A. 4).

4. Mensik's further contention that he should have been granted a severance from the trial with Grow and McGurren is based upon the misapprehension that it was improper, in the absence of a conspiracy count, to admit evidence of the statements and acts by other participants in furtherance of the scheme. Such evidence is admissible, on principles of agency, regardless of whether a conspiracy count is included and regardless of whether there is one trial or several. *United States* v. *Sapperstein,* 312 F. 2d 694 (C.A. 4); *Blue* v. *United States,* 138 F. 2d 351, 358 (C.A. 6), certiorari denied, 322 U.S. 736. The joinder here was proper. Rule 8, F.R. Crim. P.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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